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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1878

PHILIP ZANE AND JEROME E. SILVERMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-1901

ROBERT S. PERSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 495 F. 2d 683.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1974. Petitioner Persky's petition for rehearing was denied on April 30, 1974, and the peti-

[1] "Pet." refers to the petition for certiorari filed by petitioners Zane and Silverman, and "Pet. App." refers to the appendix to their petition. Petitioner Persky's petition for certiorari is designated "Persky Pet."

tion for rehearing filed by petitioners Zane and Silverman was denied on May 15, 1974. Mr. Justice Marshall extended the time for filing petitioner Persky's petition for a writ of certiorari to June 21, 1974, and the petition was filed on June 20, 1974. Zane and Silverman's petition was filed on June 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a verdict acquitting petitioners of conspiring to file a false form with the Securities and Exchange Commission barred a later verdict convicting petitioners of the substantive offense of filing a false form.

2. Whether the district court, following acquittal by the jury on the conspiracy count, erred in refusing to instruct the jury that hearsay evidence admitted in conjunction with the conspiracy count could not be considered in its deliberations on the substantive count.

3. Whether the district court unduly limited *voir dire* by refusing to pursue questions submitted by petitioner Persky dealing with prospective jurors' biases concerning attorneys.

4. Whether the rights of petitioners Zane and Silverman of either cross-examination or confrontation were limited in violation of the Sixth Amendment.

5. Whether the district court erred in not holding an identification line-up prior to allowing a witness to identify petitioners Zane and Silverman in open court.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. 78*o* provides in pertinent part:

> (d) Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78*l* of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 78*l* of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. Nothing in this subsection

shall apply to securities issued by a foreign government or political subdivision thereof.

15 U.S.C. 78ff provides:

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recover-

able in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78*o* of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

STATEMENT

After a five-week jury trial in the United States District Court for the Southern District of New York, petitioners—two accountants and an attorney—were convicted of filing a false Form 10K Annual Report with the Securities and Exchange Commission, in violation of 15 U.S.C. 78*o* and 78ff.[2] Each

[2] Petitioners were charged along with four others in a multi-count indictment. Count 1 charged petitioners and two others with conspiring to file a false annual report with the Commission for Microthermal Applications, Inc. ("Microthermal"); Count 2 charged petitioners with actually filing the false report; Count 3 charged petitioners Zane and Silverman, the accountants, with obstructing the Commission's investigation into the filing; Counts 6–12 charged petitioner Zane with perjury before the Commission during its investigation. Counts 4 and 5 were severed from trial at the instance of petitioners Zane and Silverman. (Pet. App. A 2a; 495 F. 2d at 686). The jury entered not guilty verdicts on Counts 1, 3, 6, 7, 9, 10 and 11. It returned guilty verdicts against all petitioners on Count 2, and it reported its inability to agree on a verdict on Counts 8 and 12 (which related only to petitioner Zane) (Pet. App. A 3a, 495 F. 2d at 686).

petitioner was sentenced to a two-year term of imprisonment. Four months of that term was to be served in a penal institution; the execution of the remainder of the sentence was suspended and the petitioners were placed on probation for a period of two years following their release from custody. The court of appeals affirmed in an exhaustive opinion (Pet. App. A; 495 F. 2d 683).

The facts are fully set forth in the opinion of the court of appeals. Briefly, they show that in July 1969, Microthermal, a new publicly held corporation with shares traded on the over-the-counter market, raised $800,000 by a public offering of its shares. Its offering prospectus represented that a minimum of $300,000 of the above proceeds would be invested in such safe securities as government bonds, certificates of deposits, or other interest-bearing obligations. However, between October 1969 and January 1970, Microthermal's president, Morton Kaplan, had clandestinely transferred $480,000 of the proceeds to Peter Galanis and Akiyoshi Yamada, principal operators of the Takara Partners Hedge fund. (Pet. App. A 3a; 495 F. 2d at 686).

Kaplan sought to conceal this transaction in violation of the Microthermal prospectus by having petitioner Persky, Microthermal's corporate secretary and partner in a law firm which was Microthermal's general counsel, draft a contract showing that $240,000 was invested in securities of Delanair Corporation, which Takara Partners held in their portfolio. Yamada testified that the purpose of the contract was to conceal the true nature of the transfer. Several

months later Kaplan transferred another $240,000 to Takara to bail out personal investments in that venture by Kaplan and petitioner Persky. Discovery of this misuse of funds became imminent when Takara was unable to repay Microthermal because the transferred funds were dissipated through investment by Galanis and Yamada in high risk securities (Pet. App. A 3a–4a; 495 F.2d at 687). As the court of appeals described the subsequent events (Pet. App. A 4a–5a; 495 F.2d at 687):

> The moment of truth, when Microthermal would first face the necessity of disclosing the loss, loomed on the horizon as the time for filing Microthermal's Form 10K Annual Report with the SEC approached. (Microthermal's fiscal year ended on January 31, 1970.) That Report, which was due on May 31, 1970, required Microthermal to set forth the interest-bearing obligations in which it had presumably invested the $480,000, bearing the usual certificate of a certified public accountant * * *. * * * Kaplan and Persky * * * replac[ed] Arthur Andersen & Co. with a firm that could be more "flexible" in its approach than generally accepted auditing standards and accounting principles would permit. They found such a firm in the persons of [petitioners] Philip Zane and Jerome Silverman. Over a series of meetings with Kaplan, Persky, Galanis and Yamada, the two accountants were introduced to the plot. They were asked to certify the existence of a certificate of deposit for the $480,000. Galanis for his part agreed to generate some documentation for the purported certificate.

Galanis attempted to cover up the unauthorized transaction by obtaining a letter from the Franklin National Bank of New York to the effect that Microthermal had purchased a $500,000 certificate of deposit. This was a subterfuge since the certificate had actually been paid for by a demand note on the Neuwirth Fund's account with the Bank of New York. Kaplan instructed the Bank of New York to effectuate delivery of the certificate to petitioner Persky's office (Pet. App. A 5a–6a; 495 F.2d at 687–688).

The court of appeals described the role of petitioners Zane and Silverman in this scheme as follows (Pet. App. A 6a–7a; 495 F.2d at 688):

> Zane and Silverman played no role in procuring the certificate and the false documentation. But at a meeting after the certificate switch, which was attended by all the principals, the accountants' problem was discussed. At length it was decided that Zane and Silverman would certify the existence of the certificate of deposit on the basis of a letter from the Franklin National Bank to the effect that a $500,000 certificate of deposit had been issued to Microthermal. At the same time it was agreed that Zane and Silverman's fee for the audit previously set at $6,000, would be increased by $5,000. The earlier letter sent by the Franklin National Bank to Kaplan was considered inadequate because it suggested that the certificate had been issued to Kaplan's personal account rather than to Microthermal. A new letter was sought. On June 10 the Franklin National Bank sent another letter which contained the same flawed language as the original.

A second letter on June 10 corrected the problem by stating that the certificate had been issued for the account of Microthermal. On the basis of this second letter Zane and Silverman certified that a certificate of deposit had existed for Microthermal as of January 31, 1970. The Form 10K Annual Report filed with the SEC thus included the certified financial statements showing Microthermal's cash and cash items as $525,024 when in fact at least $500,000 of this cash did not exist in any form.

ARGUMENT

1. Following two days of deliberations, the jury found petitioners not guilty on Count One (conspiracy to file a false Form 10K Annual Report with the Commission), petitioners Zane and Silverman not guilty on Count Three (obstruction of the Commission's investigation), and petitioner Zane not guilty on Counts Six, Seven, Nine, Ten, and Eleven (perjury). The jury also informed the court that it was deadlocked on the remaining counts, Counts Two, Eight and Twelve. Thereupon, petitioners moved for dismissal of those counts, contending that there was no rational basis for the jury to return a guilty verdict on Count Two, which was virtually identical to Count One. The district court denied the motion. The following morning the judge gave the jury a modified *Allen* charge and instructed the jurors to

return to their consideration of the remaining counts.[3] The jury subsequently returned a guilty verdict on Count Two, charging petitioners with substantive offense of filing a false Form 10K. No verdict was rendered on Counts Eight and Twelve, two of the perjury charges against petitioner Zane.

Petitioners contend that it was improper for the court to have allowed the jury to consider the substantive offense after it had acquitted petitioners on the conspiracy charge. However, a verdict of acquittal in a conspiracy trial does not mandate acquittal on a related substantive count unless the acquittal constitutes a necessary "determination favorable to petitioner of the facts essential to conviction of the substantive offense." *Scalfon* v. *United States*, 332 U.S. 575, 578–579. See *Ottomano* v. *United States*, 468 F. 2d 269 (C.A. 1), certiorari denied, 409 U.S. 1128; cf. *Hoag* v. *New Jersey*, 356 U.S. 464, 470–472. Each case must be judged on its particular facts. On the facts of this case, the courts below properly found that the jury, after acquitting petitioners of conspiracy to file a false Form 10K, could consistently have convicted them of the substantive offense of filing a false Form 10K. See *Ottomano* v. *United States, supra;* cf. *United States* v. *Barone*, 458 F. 2d 1027 (C.A. 3). As the court of ap-

[3] After the jury returned to the jury room, it sent the judge a note indicating that one of the jurors felt he could not change his vote on Count Two without changing his vote on Count One. Counsel for petitioners moved for a mistrial, which the court denied. The court then instructed the jury that it could no longer change its vote on Count One; that Counts One and Two were separate and distinct and the jury should consider Count Two. Petitioners Zane and Silverman objected to this instruction (Pet. App. A 9a).

peals stated (Pet. App. A 12a–13a; 495 F.2d at 691–692; footnote omitted):

> An acquittal on a conspiracy count would bar conviction on a substantive count only if it constituted a "determination favorable to the petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial." *Sealfon* v. *United States*, 332 U.S. 575, 579 (1948). Applying these standards, the inconsistency in the jury's verdicts in the present case is more apparent than real. A careful reading of the indictment and the charge to the jury indicates that the jury could have acquitted the appellants on the conspiracy charge as alleged and consistently have convicted them on the substantive count. The acquittal was not necessarily a finding that there was no conspiracy or joint criminal venture, but only that the government had failed to prove the specific conspiracy alleged in Count One. The indictment specifically alleged three overt acts in furtherance of the conspiracy. The district court, in a rather restrictive instruction to the jury, advised them that they must find one of these three acts in order to convict on the conspiracy charge. In view of this charge the jury, though convinced that a conspiracy existed, may have entertained a reasonable doubt that any of the three specified acts occurred as alleged. This finding would not have prevented it from concluding on the basis of the other evidence that the appellants had actually committed the substantive offense. Indeed, the jury was permitted to reject any version of the conspiracy and still

> find that the appellants as individuals had committed the substantive offense. For instance it could have based its verdict on a finding that each of the appellants was aware of the false nature of the report and nonetheless lent his name to the filing.

Moreover, as the court below noted, even the novel fact that the verdicts here were not simultaneous but were separated by a day in the jury's deliberations would not require reversal of petitioners' convictions (Pet. App. A 11a–12a; 495 F.2d at 690–691; footnote omitted):

> Appellants argue that the rule, which recognizes that compromise or an indication of leniency may underlie apparently inconsistent verdicts, should not apply here because no such considerations could have played a part in the jury's verdicts in the present case, since it reached a final verdict as to Count One, which it rendered before its further deliberation and verdict as to Count Two. However, the rule against disturbing inconsistent verdicts runs deeper than the principle of compromise. The validity accorded to such verdicts recognizes the sanctity of the jury's deliberations and the strong policy against probing into its logic or reasoning, which would open the door to interminable speculation. It is still possible, for instance, that because of the multiple counts with which it was confronted the jury, recognizing that it might still find appellants guilty on Count Two, decided to forego a possible guilty verdict on Count One as a means of "using its power to prevent the punishment from getting too far out of line with the crime," *United States* v. *Maybury*, 274 F.2d 899, 902 (2d Cir.

1960), and that after a night's sleep the thought of possible inconsistency first occurred to one juror. To this we might add the further possibility that the jurors, because of the inherently-prolix nature of instructions as to the law of conspiracy, which have become increasingly complicated and intricate over the years, may have misapprehended some aspect of that crime. The burdens imposed by the conspiracy charge have repeatedly been underscored by leading lights of the judiciary. *Krulewitch* v. *United States*, 336 U.S. 440, 445–458 * * * (1949) (Jackson, J., concurring); *United States* v. *Bufalino*, 285 F.2d 408, 417 (2d Cir. * * * 1960) (Lumbard, C. J.); *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.) (L. Hand, J.), *aff'd.*, 311 U.S. 205 * * * (1940); *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (L. Hand, J.). Although further examples of conjecture as to the jury's mental gymnastics are possible, the danger inherent in such endless surmise, absent a set of specific and detailed findings of fact, is readily apparent. Faced with this prospect we have long since opted in favor of according controlling weight to the jury's prerogative.

2. Petitioners also contend that it was error for the district court to refuse to instruct the jury, following its acquittal on the conspiracy count, that hearsay evidence, admitted on the ground that it was in furtherance of the conspiracy, could not be considered in ruling on the substantive count. However, the existence of a conspiracy charge is unnecessary to sustain the admission of hearsay so long as there is independent evidence that petitioners were a part of a joint ven-

ture in crime. *Ottomano* v. *United States*, *supra*, 468 F. 2d at 273, *United States* v. *Binder*, 453 F. 2d 805, 809 (C.A. 2), certiorari denied, 407 U.S. 920; *United States* v. *Annunziato*, 293 F.2d 373, 378–381 (C.A. 2), *United States* v. *Mendell*, 447 F. 2d 639, 642 (C.A. 7), certiorari denied, 404 U.S. 991; *United States* v. *Williams*, 435 F.2d 642, 645 (C.A. 9), certiorari denied, 401 U.S. 995.

Once the trial court is satisfied by a fair preponderance of independent evidence that a joint criminal enterprise exists and thus properly admits hearsay statements of a colleague in the furtherance of that enterprise (*United States* v. *Geaney*, 417 F. 2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028; *United States* v. *Annunziato*, *supra*), the initial determination to admit the evidence is not altered because the jury later decides to acquit on the conspiracy count. See *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); *United States* v. *Schaffer*, 266 F. 2d 435, 441 (C.A. 2), affirmed, 362 U.S. 511: *Ottomano* v. *United States*, *supra*.[4]

3. Petitioner Persky contends that the trial judge unduly limited the *voir dire* of prospective jurors. Persky, a lawyer, had submitted a series of questions

[4] *United States* v. *Klosterman*, 248 F. 2d 191 (C.A. 3), relied upon by petitioners (Persky Pet. 16), involved judgments of acquittal notwithstanding the verdict on conspiracy charges against two defendants following a jury verdict of acquittal on conspiracy charges against the third defendant. The Third Circuit, in reversing the substantive convictions of all three defendants, found entrapment as a matter of law and no independent evidence of a joint venture in crime. Thus *Klosterman* is not in conflict with the instant case.

designed to detect prospective jurors' "latent biases" toward attorneys. The trial court has long been granted wide discretion in the conduct of *voir dire*. *United States* v. *Dennis*, 183 F. 2d 201, 226–228 (C.A. 2), affirmed, 341 U.S. 494. Here, "the court surveyed the likely sources of bias and prompted the jurors * * * to consider for themselves what other sources of potential bias there might be" (Pet. App. A 16a; 495 F.2d at 693). Thus, the court of appeals correctly found that the district court acted entirely properly in its examination of the prospective jurors.

4. Petitioners Zane and Silverman contend that their rights of confrontation and cross-examination were curtailed in two instances—one relating to an attorney for the Commission called as a government witness and the other with reference to Yamada, a principal in Takara Partners.

a. Lester Green, an investigative attorney with the Commission, testified about statements petitioner Persky made in a meeting with Green which contradicted the testimony which Persky offered at trial. Petitioners Zane and Silverman sought to cross-examine Green as to the purpose of petitioner Persky's meeting with Green. The trial court's denial of this request was not error. As the court of appeals noted (Pet. App. A 18a–20a; 495 F.2d at 693–695), the Green testimony had been admitted solely against Persky and not against Zane or Silverman, and nothing in Green's testimony could act to prejudice either Zane or Silverman.

b. Petitioners Zane and Silverman further assert that their right to cross-examine Akiyoshi Yamada

was improperly restricted. The sole restriction imposed on petitioners by the trial court related to testimony concerning Count Four of the indictment, which had been severed from the case on petitione. ' request. In sum, Yamada admitted that he had perjured himself before the Commission in November 1970 in stating that he believed that a bona fide $500,000 certificate of deposit did exist. By use of a letter, signed by Yamada, petitioners sought to prove that Yamada had not perjured himself before the Commission, but rather was committing perjury a trial. All of this related to a period of time some three months after the conspiracy had been consummated and was collateral to the matters before the court. As the court of appeals correctly found (Pet. App. A 22a–23a; 495 F.2d at 696):

> Under the circumstances we are governed by the principle that limiting such potential excursions into collateral matters is something best left to the discretion of the trial judge. See, e.g., *United States* v. *Kahn*, 472 F. 2d 272, 279–80 (2d Cir.), *cert, denied*, 411 U.S. 982 (1973). Applying that principle here we cannot say that Judge Wyatt abused his discretion. In the five-week trial, marked by extensive cross-examination of Yamada, his credibility was thoroughly explored by counsel of recognized competence.

5. Finally, petitioners Zane and Silverman contend that the court should have conducted either a line-up or other form of informal identification, as they requested, prior to allowing Yamada to identify them in open-court. This issue was important to Zane, it is said, since Yamada claimed to have only met him once

at a meeting which Zane denied attending. Silverman, on the other hand, had confirmed that he and Yamada previously had met.

We note that there is no absolute constitutional right to a lineup (*United States* v. *Hurt*, 476 F. 2d 1164, 1168 (C.A.D.C.); *United States* v. *King*, 461 F. 2d 152, 155 (C.A.D.C.)), that not all one-man showups are impermissible (*Neil* v. *Biggers*, 409 U.S. 188; *Stovall* v. *Denno*, 388 U.S. 293), and that suggestive identifications are to be excluded only if they lead to "a very substantial likelihood of irreparable misidentification" (*Simmons* v. *United States*, 390 U.S. 377, 384; *Neil* v. *Biggers*, *supra*). There was not such a likelihood in this case, as the court of appeals correctly found (Pet. App. A at 29a–30a; 495 F. 2d at 700):

> Under these circumstances, while a hearing on the identification issue might, if requested (which it was not), have been advisable, see *United States* v. *Kaylor*, 491 F. 2d 1127. (2d Cir. 1973); *United States* v. *Mims*, 481 F. 2d 636 (2d Cir. 1973), it appears most unlikely that the in-court confrontation, even if labelled impermissibly suggestive, was the source of Yamada's identification. But even assuming it to have been capable of taint, the potential error was clearly harmless since Yamada's testimony as to the presence of Zane and Silverman at the "Rozzo" meeting was merely cumulative. Two other government witnesses, Galanis and Burns, whose identification of Zane and Silverman was unquestioned, placed the two accountants at the conspiratorial meetings. Yamada's identification of Zane and Silverman

was in no sense central to this case. See *United States ex rel. Cummings* v. *Zelker*, 455 F. 2d 714 (2d Cir.), *cert. denied*, 406 U.S. 927 * * * (1972); *United States* v. *Abbate*, 451 F. 2d 990 (2d Cir. 1971); *United States* v. *Baker*, 419 F. 2d 83 (2d Cir. * * * 1969), *cert. denied*, 397 U.S. 976 * * * (1970).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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